No. 73-1096

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In the Supreme Court of the United States

OCTOBER TERM, 1973

RAYMOND GENE NOVELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Washington, D.C. 20530.

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After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on three counts involving use of the mails to execute a scheme for receiving kickbacks in violation of 18 U.S.C. 2 and 1341. He was sentenced to consecutive four year terms on Counts I and II. He was sentenced to a five year term of imprisonment on Count III, but imposition of sentence was suspended and he was placed on probation for five years at the conclusion of his release from confinement, the suspension of the sentence to be conditioned upon restitution of the total amount of money alleged in the indictment to have been taken ($21,200) within 30 days after judgment has become final. A fine of $1,000 was additionally imposed on each of the three counts. The court of appeals affirmed without opinion (Pet. App. 21).

Petitioner was employed by El-Tee Corporation in Houston, Texas, to put bids together and bring together initial estimates for designated projects[1] (App. 9, 184-187).[2] El-Tee was a subsidary of Jacobsen Construction Company, with its home office in Salt Lake City, Utah (App. 228). Samuel W. Turner,[3] owner of Gypsum Systems in Houston, a dry wall contracting firm, met petitioner when Turner bid on a subcontract for El-Tee Corporation in Houston (App. 52-53). Turner then bid on the Princessa Apartments dry wall job in Houston, and subsequently on jobs involving the Jenkins House Apartments and Red Bluff Villas, both in Pasadena, Texas (App. 53-54, 69, 79).[4]

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[1]Petitioner's contract of employment executed on August 16, 1968, provided that his compensation should be one percent of the cost of construction, to be paid at the rate of $1,500 per month during construction with the balance after completion of each project. A subsequent October 7, 1968 contract, provided that petitioner was to receive 75 per cent of all profits realized by the contractor in excess of 5 per cent of the construction cost on each project. Petitioner was to be advanced $1,500 per month beginning with the execution of the first of such contracts, and the balance, if any, was to be paid after completion (App. 11-16).

[2]"App." refers to the appendix filed with the court of appeals, a copy of which is being lodged with the Clerk of this Court.

[3]Turner was named in the indictment but was not indicted (App. 395-401).

[4]Count I of the indictment (App. 395-397) concerned Turner's agreement with El-Tee Corporation for work to be performed on the Princessa Apartments, Count II (App. 397-399) concerned the Jenkins House Apartments, and Count III (App. 399-401) the Red Bluff Villas.

On the Princessa Apartments job, Turner initially bid $186,759 (App. 55). The bid was submitted to petitioner in person without any written record being kept (App. 56). Petitioner told Turner his bid was too high and Turner, after refiguring the costs, lowered his bid to $170,764.03(App. 57). The May 16, 1969, contract price, however, was set at $175,000, the difference between Turner's bid and the actual contract price being turned over to petitioner (App. 57-58,65).

On the Jenkins House Apartments, Turner initially gave petitioner a bid of $275,348 (App. 70-71). Turner then increased his bid by $3,000 to include firewalls (App. 72-74). The June 6, 1969 contract was written for $288,000, including $1,000 petitioner owed Turner on a car trade and a $9,000 kickback to petitioner (App. 74-76, 86-88).

On the Red Bluff Villas job, petitioner bid $150,000 (App. 80). His bid was accepted by petitioner but the August 14, 1969 contract was written for $158,000, the $8,000 balance being a kickback to petitioner (App. 80-84). Turner testified that he paid the kickbacks because he knew if he did not, petitioner would not give him any more work (App. 85). Turner's records substantiated the fact that the kickbacks had been paid (App. 91-92, 97-100).[5]

The Princessa subcontract, executed on May 16, 1969, by Turner and Richard Squires, who was in charge of the El-Tee Texas operations, was stamped"[R]eceived May 19, 1969, 10:28 a.m., Jacobsen Construction Company, Salt Lake City" (App. 138, 235). The Jenkins House Apartments subcontract, executed in Texas on June 6, 1969, did not contain a date stamp (App. 237-239).

[5]The actual contract prices paid were subsequently adjusted to reflect change orders made by El-Tee.

The Red Bluff Villas subcontract, executed on August 14, 1969, by Turner and Squires, was stamped received on August 18, 1969, in Salt Lake City (App. 240).

Petitioner did not testify. He called two witnesses, neither of whom contradicted the government's testimony establishing the kickbacks (App. 336-352).

1. Petitioner contends that the evidence was insufficient to support his conviction. This contention is answered by the facts which show petitioner's connection with the scheme to defraud El-Tee by arranging financial kickbacks to himself as a condition to granting dry wall contracts to Turner, in violation of his fiduciary duty to the corporation and, specifically, his contract with it.[6] Moreover,

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[6]The fact that the judge did not require the jury to find explicitly that petitioner had had sufficient relationship with El-Tee to create a violation of that relationship is immaterial. Petitioner failed to request a specific finding or to object to the charge to the jury on this ground, although he did voice other objections to the charge (App. 378-379). Moreover, in his charge the judge stated as follows (App. 369):

> Three essential elements are required to be proved in order to establish the offense charged in the indictment:
>
> First, the act or acts of having devised or having intended to devise a scheme or artifice to defraud, or attempt to defraud, El-Tee Corporation out of the sums of money as alleged in the indictment;
>
> Second, the act of acts of placing, or causing to be placed, in an authorized depository for mail matter, a letter intended to be sent or delivered by the post Office Department, as charged; and
>
> Third, the act or acts of so using the United States Mail wilfully and with specific intent to carry out some essential step in the execution of said scheme or artifice to defraud, or attempt to do so as charged.

as petitioner himself admits (Pet. 10), while he did move for a judgment of acquittal at the conclusion of the government's evidence, he failed to preserve his rights by renewing that motion at the close of all the evidence, see *Hall* v. *United States*, 403 F. 2d 649, 650 (C.A. 5).[7]

2. Petitioner contends that the mailing of the three contracts in question was not such an essential part of the fraudulent scheme as to create a violation of 18 U.S.C. 1341. The mailing of the contracts to the headquarters of El-Tee in Salt Lake City, Utah, however, was necessary for the purpose of executing the scheme, which involved defrauding the corporation of the sums of money involved. Moreover, since payments to subcontractors on Texas subcontracts were also sent from Salt Lake City to Houston (App. 229), the receipt of the proceeds of the fraudulent scheme required the use of the mails.

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[7]Petitioner's contention that the indictment was insufficient to charge an actual fraud is without merit. That indictment (App. 395-401) charges petitioner, acting as an agent for El-Tee Corporation, with having agreed to cause El-Tee to enter into three contracts with Turner at inflated prices so that Turner could transfer the excess to petitioner, the transfers to be concealed from El-Tee. The charge is thus one of actual, not constructive, fraud. See *Epstein* v. *United States*, 174 F.2d 754, 765-766 (C.A. 6): "Actual fraud has been defined as intentional fraud, consisting in deception intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed. It requires intent to deceive or defraud. To constitute actual fraud, there must be such a fraud as affects the conscience. Constructive fraud is a breach of legal or equitable duty which, in spite of the fact that there is no moral guilt resulting from the breach of duty, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interest. * * * [C]onstructive fraud is a term that means, essentially, nothing more than the receipt and retention of unmerited benefits" (citations omitted.).

In any event, it is not necessary that use of the mails be planned as an essential element of the scheme. "Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonable be foreseen, even though not actually intended, then he 'causes' the mails to be used", *Pereira* v. *United States*, 347 U.S. 1, 8-9; see also *United States* v. *Sampson*, 371 U.S. 75.[8]

3. Petitioner contends that there was insufficient evidence to prove that the Jenkins House Apartment sub-contract was mailed. The June 6, 1969, subcontract, although received by El-Tee, did not contain a date stamp. Garth E. Briggs, who had been employed by Jacobsen Construction Company at the time the alleged fraud took place, testified that the policy of the Company's Texas office "was that at the conclusion of each day they would put in an envelope everything to be mailed to Salt Lake City and mail it immediately, so there is supposed to be a daily mailing to our Salt Lake City office" (App. 229; see also 163). He added that subcontracts would be included in the mailings (App. 229). When the mail was received in Salt Lake City, the office manager would sort out personal mail and take the remainder to the receptionist who would open and date it (App. 230-231). Both the Princessa and Red Bluff Villas subcontracts were dated in this manner (App. 235, 240). Briggs explained that there could be three explanations why the Jenkins House Apartments subcontract

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[8]This is not a case like *United States* v. *Maze*, No. 72-1168 (decided January 8, 1974), in which this Court held the fraudulent use of a credit card was not a violation of the mail fraud statue. In *Maze* the mails were used only to send bills from defrauded motel owners to the bank which managed the account of the stolen credit card. Here the mails were used to notify El-Tee of the fact that contracts had been signed, and to send the payments which were the object of the scheme - elements which were essential to the success of the fraud, and not merely subsequent events as in *Maze*.

lacked a date stamp. First, it had not been mailed;[9] second, it had not been stamped due to the receptionist's oversight; or third, it had arrived on a Saturday, when the receptionist did not work, and had been processed by the office manager, who did not customarily use the date stamp (App. 238, 245-246.

In his charge to the jury the trial judge stated as follows (App. 373):

> The Government is not obligated to prove use of the mails by direct evidence. Use of the mails may be established by circumstantial evidence. You should consider the totality of the surrounding circumstances in determining whether or not defendant caused the mails to be used, including:
>
> (1) Whether or not it was El-Tee Corporation's normal business practice to mail the subcontracts from Houston, Texas to the home office in Salt Lake City, Utah;
>
> (2) Whether or not the subcontracts arrived in Salt Lake City, Utah, in the normal channel of a mail matter; and
>
> (3) Whether or not it would have been possible for an El-Tee Corporation employee to have hand-carried the subcontractors [sic] from Houston to Salt Lake City.

Viewing the evidence in the light most favorable to the Government, there was sufficient evidence to show the contract was mailed from Houston to Salt Lake City in

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[9]The possibility that it had been hand carried to Salt Lake City by a company representative was refuted by evidence indicating that the only such representative travelling between Salt Lake City and Houston at the relevant time had not carried it (App. 22, 260).

the ordinary course of business and to sustain petitioner's conviction, Glasser v. *United States*, 315 U.S. 60, 80; see also *Pereira* v. *United States, supra.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.